

THE HON. MARSHA J. PECHMAN

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON

A.B., by and through her next friend CASSIE  
CORDELL TRUEBLOOD, *et al.*,

Plaintiffs,

v.

WASHINGTON STATE DEPARTMENT OF  
SOCIAL AND HEALTH SERVICES, *et al.*,

Defendants.

No. 14-cv-01178-MJP

**PLAINTIFFS' RESPONSE TO  
DEFENDANTS' MOTION TO  
MODIFY THE INJUNCTION**

**I. INTRODUCTION**

Defendants have moved this Court to extend the timeframe to comply with this Court's injunction mandating the timely provision of competency services to Plaintiffs-Class Members. Although a time extension is all but inevitable since the January 2, 2016, deadline has long passed and Defendants now assert they will simply be unable to timely comply with the injunction, Plaintiffs urge the Court to note the following: (1) Defendants' request for a time extension was necessitated in large part by their repeated refusal to work meaningfully with the Court Monitor ("Monitor") and, unless they are directed to do so in compliance with the injunction going forward, it is unlikely Defendants will be able to comply even by June 2016; and (2) Defendants should not be permitted to seek substantive modifications to the injunction under the guise of a request for a time extension.

First, Defendants' claim that their need for additional time to comply with this Court's injunction stems solely from unexpected findings of safety violations by the Centers for Medicare and Medicaid Services ("CMS") is simply factually inaccurate. There is no question that Defendants have wholly failed to comply with the injunction: indeed, instead of decreasing wait times for competency services, the following chart demonstrates Defendants have allowed the delays for both evaluations and restoration actually to *increase*:

DSHS Competency Service	Average Number of Days, ESH (trial and current)		Average Number of Days, WSH (trial and current)	
In hospital evaluation	41.2	86.0	30.6	22.4
In jail evaluation	56.3	45.6	14.7	15.2
Restoration	20.9	94.0	29.8	36.6

Although the CMS findings may have played some role in Defendants' failure to comply, Defendants' pleadings omit their portion of culpability for the delays leading up to CMS enforcement in December 2015. If this culpability—which is the result of Defendants' refusal to adhere to the Monitor's recommendations—goes unaddressed, it will inevitably result in future delays. These delays have dire consequences. As noted in the Monitor's recent report, two Class Members have died in jail while waiting for competency services. Dkt. 180 at 3, 19.

Second, while modification regarding the timing of compliance may be warranted, of greater concern is Defendants' attempt to wholesale rewrite this Court's injunction regarding the provision of competency restoration services in a therapeutic environment. Defendants' Long Term Plan provided for additional beds for competency restoration services at the state psychiatric hospitals and only thirty temporary beds in correctional settings. Dkt. 164 at 13. Defendants now seek to rely extensively, and potentially permanently, on fifty-four restoration beds in correctional facilities that do not mirror the "therapeutic environment of a psychiatric

hospital.” Dkt. 131 at 22. Defendants should not be permitted to undermine the Court’s injunction by cloaking these substantive modifications as a time extension, and none of the evidence they have proffered as to changed circumstances justify these changes.

## II. ARGUMENT

### A. A Limited Extension of the Compliance Date May Be Warranted but Defendants’ Reliance on the CMS Enforcement is Unpersuasive.

“A party seeking modification . . . of an injunction bears the burden of establishing that a significant change in facts or law warrants revision . . . of the injunction.” *Sharp v. Weston*, 233 F.3d 1166, 1170 (9th Cir. 2000). The party must show one of the following: 1) changed factual conditions make compliance with the decree substantially more onerous; 2) the decree proves to be unworkable because of unforeseen obstacles; 3) enforcement would be detrimental to the public interest. *Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 367, 384 (1992).

Defendants argue under the first two *Rufo* prongs that unforeseen facts regarding CMS enforcement at Western State Hospital (“WSH”) (only one of the two psychiatric hospitals that are subjects of the injunction) have caused them to be unable to provide competency services within seven days by January 2, 2016. Def. Br. at 1. Defendants claim their failure to comply was caused by the threatened loss of federal funding after CMS determined WSH was unsafe because Defendants, in part, had failed to adequately staff the facility. This finger pointing is disingenuous because many of the actions Defendants could have taken to reduce wait times are consistent with remedying the CMS finding. For example, the CMS finding that WSH has insufficient staff to protect patients and staff is wholly in keeping with this Court’s conclusion that Defendants have failed to appropriately staff the state psychiatric hospitals to keep up with the demand for mental health services. *See* Dkt. 131 FOF 35.

**B. Defendants' Failure to Timely Comply Stems from Abandonment of the Long Term Plan and Failure to Adhere to the Monitor's Recommendations.**

Defendants originally identified the following in their Long Term Plan as necessary actions for compliance with this Court's injunction by January 2, 2016 and for years to come:

- Increase the number of forensic beds (Dkt. 164 at 14);
- Increase the number of forensic evaluators (Dkt. 164 at 11);<sup>1</sup>
- Create outstations for evaluators in areas that are not located near a state psychiatric hospital (Dkt. 164 at 12);
- Create a robust and reliable data system (Dkt. 164 at 16);
- Develop triage models (Dkt. 164 at 13); and
- Use diversion to reduce the demand for competency services and provide mental health treatment in the less restrictive environment (Dkt. 164 at 17).

As detailed below, Defendants failed to take appropriate steps to implement each of these six actions consistent with their Long Term Plan to reach compliance. Defendants' failure to implement the steps identified in their Long Term Plan occurred before CMS's visit, has nothing to do with CMS enforcement, and stems instead from their repeated refusal to work appropriately with the Monitor as directed by this Court's injunction. Dkt. 131 at 23-24.

**1. Defendants Abandoned Their Plan to Increase Bed Capacity and Related Staffing at the State Hospitals.**

This Court ordered Defendants to secure sufficient bed space and related staff so as to allow for the admission of class members to hospitals within seven days. Dkt. 131 at 22.

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<sup>1</sup> Although Defendants have appealed the portion of this Court's injunction requiring the State to perform competency evaluations within seven days, Defendants did not seek a stay of the order while it is on appeal. Regardless of whether the Court has jurisdiction over this portion of the injunction, the facts underlying Defendants' action regarding implementation of timely competency evaluation are informative for the Court to consider when determining whether to grant Defendants' request for a modification of the injunction. Further, appropriate staffing levels at the state hospitals impact the ability to provide both evaluation and restoration services.

Defendants' Long Term Plan committed to "increase the bed capacity for competency restoration services." Dkt. 164 at 4, 14. This included bed expansion at both WSH and ESH. *Id.* at 6. To meet these commitments, Defendants secured \$26.86 million to pay for 129.2 "direct care staff to operate 90 additional Competency Restoration treatment beds." Dkt. 176 Attach. E at 16. However, bed expansion at WSH has been indefinitely postponed. *See* Cooper Decl. at 1 (citing to Secretary Quigley November 3, 2015, letter stating, "I have concluded we must take a full pause on expansion until we are able to fill our many deep staffing needs."). Defendants also claim that thirty new beds at Eastern State Hospital ("ESH") "are expected to be operational by January 2016." Dkt. 176 Attach. E at 14. However, Defendants identify the failure to recruit sufficient staff as a barrier to opening the new ESH unit. *Id.* at 35.

The staffing issues at DSHS are neither new nor unforeseen. In nearly every Quarterly Report to the legislature submitted since they began reporting in 2012, DSHS identified staffing resources as a key barrier to the provision of timely services. *See* Trial Exs. 26-34. Prior to trial, DSHS repeatedly claimed that staffing was the primary barrier to meeting the seven day target to provide competency services. Ex. 30 at 3 ("We have had challenges from initial implementation of this legislation during a time of fiscal cuts and shortages..."); *Id.* at 5. ("We cannot address this problem fully without additional resources devoted solely to forensic services."). Both DSHS's consulting experts, Groundswell, and the independent legislative auditors agreed. *See* Trial Ex. 35 at 20 and Ex. 24 at 17 ("[T]he two state hospitals likely did not meet the assumed staffing and productivity standards.").<sup>2</sup> Recent CMS enforcement has only clarified what

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<sup>2</sup> Defendants' witnesses' testimony at trial was consistent with the Quarterly Reports. Several DSHS employees testified they could provide timely competency services with appropriate staffing and related resources. *See Ward V.* 5 102: 18-22 and 103:5; Powers Vol. 5, 45:11-19; Waiblinger V. 4, 141: 11-18. Dr. Waiblinger went on to clarify that he believed he could get the waitlist down to under seven days in six months with appropriate resources. V.4, 146: 14-25.

1 Defendants have long known: DSHS has been unable to recruit and retain sufficient staff to  
 2 address the needs of all patients including class members.

3 Defendants' failure to remedy their long-standing problem of inadequate staffing  
 4 contributed to the CMS enforcement and is the likely result of their refusal to engage  
 5 meaningfully with the Monitor's recommendations. For example, the Monitor has repeatedly  
 6 recommended Defendants expedite licensing of the new staff, exercise emergency administrative  
 7 authority to hire contract staff, and diversify the pool of clinicians who can provide competency  
 8 services. Dkt. 180 at 34 and 44; Dkt. 171 at 32-34. However, Defendants refused to consider  
 9 diversifying the clinical staff and instead waited three months after this Court's order to receive  
 10 legislative funding to hire additional staff rather than seeking emergency funding or again  
 11 contracting for staff pursuant to an emergency declaration. Dkt. 164 at 12 and 7.

12 2. Defendants Failed to Hire Sufficient Forensic Evaluators to Reduce Delays in  
 13 Competency Evaluation.

14 This Court also ordered Defendants to secure sufficient evaluation staff so as to allow  
 15 them to provide competency evaluations within seven days. Dkt. 131 at 22. The State allocated  
 16 monies for \$4.67 million to pay for 18 new competency evaluator staff. Dkt. 176 Attach. E at  
 17 16. However, Defendants have failed to fill all of these positions, Dkt. 176 Attach. E at 13,  
 18 resulting in wait times that have actually gotten worse since this case was tried. WSH's current  
 19 average to provide in jail evaluation is 15.2 days. Dkt. 176 Attach. E at 7. ESH's average is  
 20 45.6 days. *Id.* at 8. While ESH's in-jail evaluation waitlist has consistently been far worse than  
 21 WSH, *see Id.*, DSHS has hired eight of nine evaluators at WSH. *Id.* at 19. In fact, DSHS only  
 22 hired three out of the planned five evaluators at ESH, eventually transferring one of the ESH  
 23 open positions to WSH. *Id.*

1 The Monitor informed Defendants that bringing in temporary competency evaluators  
 2 would be a swift and timely way to bring down the wait list for those who are waiting for  
 3 competency evaluations and could be done while Defendants went through the traditional hiring  
 4 process for permanent competency evaluators. Dkt. 180 at 20, 33, 44; *see also* Dkt. 171 at 36,  
 5 40, 45. She additionally recommended Defendants explore using other mental health providers  
 6 to perform competency evaluations, including MSWs and other designated mental health  
 7 providers similar to the types of practitioners who perform civil commitment evaluations. Dkt.  
 8 180 at 33. Defendants declined to follow the Monitor's suggestions.

9 3. Defendants Failed to Create Appropriate Evaluation Outstations.

10 As the Groundswell consultants identified in 2013, there is a great need for Defendants to  
 11 develop outstations for competency evaluators. Trial Ex. 35 at 21. This need is particularly  
 12 strong in eastern Washington, where travel times between jails and ESH are significant and  
 13 weather is often an obstacle. *Id.* Defendants reaffirmed the need to create outstations in their  
 14 Long Term Plan as a means of reducing wait times for competency evaluations. Dkt. 164 at 12.  
 15 Defendants identified the Tri-Cities as a location for an ESH outstation. *Id.* However, after  
 16 developing their Long Term Plan, Defendants failed to create permanent outstations in eastern  
 17 Washington other than a part-time outstation in Yakima.<sup>3</sup> Defendants' decision to not follow  
 18 their own plan and outside recommendations to create outstations in areas of eastern Washington  
 19 with high referrals coupled with the continued lack of sufficient evaluators have contributed to  
 20 the skyrocketing delays for competency evaluations at ESH. None of this has anything to do  
 21 with CMS findings regarding staffing issues at WSH. Further, starting in August 2015, the

22  
 23 <sup>3</sup> Although the State is now sending WSH evaluators to Yakima to perform evaluations, the process is *ad hoc* with  
 no set schedule. Dkt. 176 Attach. E at 19 and 28.

1 Monitor also repeatedly noted that Defendants' efforts to create outstations in eastern  
 2 Washington were lagging. Dkt. 171 at 31; Dkt. 180 at 29.

3 4. Defendants Failed to Create a Robust and Reliable Data System.

4 The Court ordered Defendants to file a report with the Monitor and to include data  
 5 regarding wait times, estimates for compliance, and resources need to reach compliance. Dkt.  
 6 131 at 23-24. The Court also entered a finding of fact that "the lack of accurate data and timely  
 7 performance reporting makes it difficult for DSHS to understand and predict demand for their  
 8 services, to improve their operating policies and procedures, and to adequately plan for the  
 9 future. Dkt 131 FOF 32.<sup>4</sup> Likewise, Defendants' Long Term Plan referenced the long-standing  
 10 problems it has had with accurate data and the need to appropriately allocate resources. Dkt. 164  
 11 at 16. The Monitor reported on January 8, 2016, "One of the major problems plaguing the  
 12 administration of the forensic and competency services system is data reporting." Dkt. 180 at 43.  
 13 The Monitor recommends prioritizing the validation of data and reporting "to enable the Parties  
 14 to estimate requirements for achieving compliance." Dkt. 180 at 45. However, Defendants have  
 15 failed to implement procedures to ensure reliable data despite having had nine months to do so.

16 5. Defendants Failed to Develop and Implement Triage Protocols.

17 In their Long Term Plan, Defendants identified a need to develop and implement triage  
 18 protocols. Dkt. 164 at 12; Dkt. 131 at 13. Triage protocols are a necessary component of  
 19 reducing the harms that Plaintiffs-Class Members with acute mental illness suffer in jail  
 20 (including worsening mental health symptoms and risks of injury or death) by prioritizing those  
 21 who require treatment including, in more severe cases, inpatient psychiatric hospitalization. *Id.*

22 \_\_\_\_\_  
 23 <sup>4</sup> Groundswell, the experts DSHS retained, also noted that DSHS data was unreliable, and the lack of reliable data posed an obstacle in allocating staffing resources appropriately. Trial Ex. 35 at 11.



1 This strategy was identified as necessary at trial, in this Court's order, and was reaffirmed as an  
 2 effective strategy for minimizing harm to class members by Dr. Mauch. Dkt. 180 at 20, 33; Dkt.  
 3 171 at 22-23. However, although the State identified the need to develop and implement triage  
 4 protocols, Defendants have failed to do so. Dkt. 180 at 8; *see also* Cooper Decl. at 2.

5 6. Defendants Have Failed to Use Money Allocated for Diversion.

6 The Court ordered Defendants to include in their Long Term Plan, "how they will  
 7 continue to provide services with seven days, even as demand for such services continues to  
 8 grow and the state hospitals' existing campuses reach their full capacities." Dkt. 131 at 23. The  
 9 Defendants' Long Term Plan stated they secured \$4.81 million dollars to divert class members  
 10 from the forensic mental health system and into "community-based treatment." Dkt. 164 at 4, 6.  
 11 The Monitor noted that \$4.8 million was "modest given the scope of need for these services in  
 12 Washington." Dkt. 180 at 31; Dkt. 171 at 41. The Monitor also repeatedly identified several  
 13 programs and entities that serve as a foundation for diversion services as well as ways to  
 14 leverage the funds. Dkt. 180 at 14 and 31; Dkt. 171 at 14-15. However, Defendants failed to  
 15 take action and follow up on these recommendations seven months after they were initially  
 16 issued and despite "the need for diversion is growing." Dkt. 180 at 31.

17 This inaction is also wholly unrelated to the CMS enforcement and instead a direct result  
 18 of Defendants' unwillingness to engage with the Monitor. Less than two months from the  
 19 compliance deadline, DSHS responded to the Monitor's request for a diversion update and stated  
 20 for the first time that it had barriers to spending the legislated funding. *Id.* at 14-15. The  
 21 Monitor has also raised concerns regarding the lack of diversion funds in the Governor's 2016  
 22 Supplemental Budget. *Id.* at 31. Finally, the Monitor recommends Defendants consider  
 23

1 “Medicaid program demonstrations and waivers” as they have done with other aspects of the  
 2 system. *Id.* Defendants have to yet to respond to these recommendations.

3 **C. Defendants Should Not be Permitted to Significantly Modify the Injunction By**  
 4 **Providing Services to Some Class Members in Correctional Facilities.**

5 This Court ordered Defendants to provide restoration services in the “therapeutic  
 6 environment of a psychiatric hospital.” Dkt. 131 at 22. To comply with this directive,  
 7 Defendants planned to build additional capacity at the state psychiatric hospitals and to use  
 8 outside facilities, for a short period of time, to clear the backlog of class members waiting for  
 9 restoration services. Dkt. 164, pgs. 13-17. Instead of providing competency restoration services  
 10 in facilities that are as therapeutic as a state psychiatric hospital, Defendants have now chosen to  
 11 provide restoration services in correctional facilities—even though the Monitor noted serious  
 12 concerns with the efficacy of jail based restoration, Dkt. 171 at 36, and even though this Court  
 13 found that the state hospitals are “an appropriate environment for mental health treatment.” Dkt.  
 14 131 FOF 26. Defendants should not be permitted to undermine this Court’s injunction by  
 15 placing some class members in correctional settings where the competency restoration services  
 16 will not be the equivalent of restoration services offered in the state psychiatric hospitals.

17 The state hospitals are certified by CMS and the Joint Commission, have group and  
 18 individual therapy rooms, outdoor spaces, individual rooms that patients can enter or exit freely,  
 19 longstanding and fully developed restoration treatment protocols, and requirements regarding the  
 20 use of seclusion and restraint that comport with best practices. *See* Dkt. 180 at 34; Dkt. 131 FOF  
 21 26. Neither of the two correctional based restoration programs Defendants are developing  
 22 provide the same level of services or therapeutic treatment as the restoration services provided in  
 23 the state psychiatric hospitals. Dkt. 180 at 34. Indeed, Dr. Deborah Pinals, a consultant for the

1 Monitor, articulated several concerns with providing restoration services in correctional  
2 facilities. She noted that neither facility would be licensed as a hospital nor accredited by either  
3 CMS or the Joint Commission. Dkt. 180 at 37. She found YCCC has a “correctional feel,” and  
4 noted class members would be expected to wear correctional attire. Dkt. 180 at 542 and 547.  
5 Bedrooms in the YCCC would house four individuals, as opposed to single or double rooms at  
6 the hospitals, and would not have sufficient partitions to provide privacy, deepening the sense  
7 that the environment is more correctional than therapeutic. Dkt. 180 at 547. In addition, it is  
8 unclear how much patients would be in contact with correctional staff or be subjected to jail  
9 sanctions, rules, and regulations. Dkt. 180 at 545-547.

10 Dr. Pinals expressed many of the same concerns regarding Maple Lane. Dkt. 180 at 547.  
11 And finally, she noted that DSHS has only vague ideas about how these facilities could be used  
12 to provide therapeutic services (*e.g.*, Defendants failed to identify a provider with prior forensic  
13 experience to provide restoration services at Maple Lane; evidenced a lack of clarity on self-  
14 harm mitigation strategies; and have not planned for removal of the elevated control center to  
15 make the environment feel therapeutic and not correctional). Dkt. 180 at 558-563. However,  
16 Defendants failed to incorporate these recommendations before contracting for in-jail restoration  
17 at YCCC and Maple Lane. Dkt. 180 at 35-36. Instead, Defendants have unilaterally decided to  
18 spend at least \$8.97 million, Dkt. 164 at 5, to focus on developing two entirely new standalone  
19 programs in correctional settings, the likes of which have never existed in Washington.

20 Defendants have considered corrections-based restoration in the past, but rejected it after  
21 their own consulting experts found that such programs are “not a national best practice model,”  
22 and that they present challenges because of the “limited capabilities of correctional facilities to  
23 provide adequate mental health care, and perhaps most importantly, significant concerns

1 regarding civil liberties and least restrictive settings for mental health treatment.” Trial Ex. 35 at  
 2 32. Nonetheless, Defendants continue to pursue remedying the constitutional violation arising  
 3 from their underlying failure to provide competency services by shuffling class members from  
 4 one correctional facility to another and by not providing the same level of care at the correctional  
 5 facility based restoration programs as at the state psychiatric hospitals.

### 6 **III. CONCLUSION**

7 Defendants have repeatedly failed to work with the Monitor to bring their evaluation and  
 8 restoration system into compliance with this Court’s injunction. Their failure to meet the  
 9 deadline set by this Court was thus all but inevitable, regardless of any outside federal action  
 10 taken by CMS. They seek now not only an extension from the Court but also substantive  
 11 changes to the injunction itself. This Court should act to prevent further floundering by  
 12 Defendants.

13 If this Court determines that an extension of time is necessary, Plaintiffs respectfully  
 14 request that the Court direct Defendants to develop a new Long Term Plan consistent with the  
 15 original injunction and that Defendants respond in writing to each of the Monitor’s outstanding  
 16 recommendations regarding compliance. Given Defendant's efforts to provide competency  
 17 services in a non-therapeutic environment and failure to adhere to the Monitor’s  
 18 recommendations in violation of the Court's order, these steps are consistent with and necessary  
 19 to ensure compliance with this Court's injunction.

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1 DATED this 11th day of January, 2016.

2 /s/Emily Cooper

3 DISABILITY RIGHTS WASHINGTON

4 David R. Carlson, WSBA No. 35767

5 Emily Cooper, WSBA No. 34406

6 Disability Rights Washington

7 315 Fifth Avenue South, Suite 850

8 Seattle, WA 98104

9 (206) 324-1521

10 davidc@dr-wa.org

11 emilyc@dr-wa.org

12 /s/Anita Khandelwal

13 PUBLIC DEFENDER ASSOCIATION

14 Anita Khandelwal, WSBA No. 41385

15 Public Defender Association

16 810 Third Avenue, Suite 800

17 Seattle, Washington 98104

18 (206) 447-3900

19 anitak@defender.org

20 /s/La Rond Baker

21 ACLU OF WASHINGTON FOUNDATION

22 La Rond Baker, WSBA No. 43610

23 Margaret Chen, WSBA No. 46156

ACLU of Washington Foundation

900 Fifth Avenue, Suite 630

Seattle, Washington 98164

(206) 624-2184

lbaker@aclu-wa.org

/s/Christopher Carney

CARNEY GILLESPIE ISITT PLLP

Christopher Carney, WSBA No. 30325

Carney Gillespie Isitt PLLP

315 Fifth Avenue South, Suite 860

Seattle, WA 98104

(206) 445-0212

Christopher.Carney@CGILaw.com

*Attorneys for Plaintiffs*

**CERTIFICATE OF SERVICE**

I hereby certify that on the 11<sup>th</sup> day of January, 2016, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the following:

- Nicholas A Williamson ([NicholasW1@atg.wa.gov](mailto:NicholasW1@atg.wa.gov))
- Sarah Jane Coats ([sarahc@atg.wa.gov](mailto:sarahc@atg.wa.gov))
- Amber Lea Leaders ([amberl1@atg.wa.gov](mailto:amberl1@atg.wa.gov))

DATED: January 11, 2016, at Seattle, Washington.

/s/Mona Rennie

Mona Rennie  
Legal Assistant